Advanced Stretchforming International, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL–CIO. Case 21–CA–29104

April 25, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The only issue raised by the exceptions[1] in this case is whether the Respondent, as a successor employer obligated to recognize the Union's continuing status as a collective-bargaining representative, had the legal right to establish unilaterally its initial terms and conditions of employment for bargaining unit employees. The judge found that the Respondent had this right under the standard set forth in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order.[2] For the reasons which follow, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its employees' wages and other terms and conditions of employment at the time of their hire.

Two predecessor employers engaged in stretch forming operations at the Gardena facility involved in this case. During the period that the first predecessor operated the enterprise, the Union was recognized as the exclusive collective-bargaining representative for the production and maintenance employees. The second predecessor, Aero Stretch, Inc. (Aero), acquired the operation in 1990 and negotiated an agreement with the Union effective from August 19, 1991, through August 19, 1994. In June 1992,[3] Aero declared bankruptcy but continued to operate the facility through November 30. When Aero ceased operations, 17 unit employees remained. On November 19, Steven Brown purchased Aero's assets. On December 1, Brown incorporated the Respondent.

As required by order of the Bankruptcy Court, Aero terminated all of its employees on November 30. On that day, according to the credited testimony, Eric Cunningham, Aero's operations director (an agent of the Respondent and formally hired by the Respondent on December 1 as general manager), told the employees that a majority of them would be hired by the Respondent but there would be no union and no seniority. On December 1, the Respondent formally employed the entire management, professional and administrative staff, and eight of the unit employees terminated by Aero on November 30. The Respondent hired no employees from other sources at that time.

On December 1, all employees interviewed for employment were informed that they would be working under new terms and conditions which were subject to change, that the Respondent was not assuming the collective-bargaining agreement, and that they would be employed on an at-will basis. The Respondent's initial terms provided for less vacation time and fewer paid holidays than employees had received under Aero. In contrast to Aero, the Respondent provided no medical or dental benefits. Of the eight unit employees hired by the Respondent on December 1, four received the same hourly wage rate they had received at Aero, two received wage increases that exceeded a dollar per hour, and two received wage decreases that were more than a dollar per hour.

The judge found that the Respondent violated Section 8(a)(1) by telling employees at the November 30 meeting that there would be no union. This statement was a clearly unlawful message to employees that the Respondent would not permit them to be represented by a union.[4] Relying on *Burns*, as interpreted by the Board majority in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the judge nevertheless found that the Respondent did not violate Section 8(a)(5) of the Act by unilaterally setting different terms and conditions of employment for the unit employees.

The judge noted that the Supreme Court in *Burns* recognized certain circumstances which require that a successor employer bargain with the union before changing the terms and conditions of employment of the unit employees. In particular, the Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to

[1] On November 18, 1994, Administrative Law Judge William L. Schmidt issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief and the Charging Party filed a reply brief. The Service Employees International Union filed an amicus statement.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] All dates are in 1992 unless otherwise indicated.

[4] *Love's Barbeque Restaurant*, 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981). The Respondent does not except to this unfair labor practice finding or to the judge's finding that it subsequently violated Sec. 8(a)(5) and (1) of the Act by polling unit employees concerning representation by the Union and by thereafter refusing to recognize and bargain with the Union.

> have him initially consult with the employees' bargaining representative before he fixes terms.[5]

The judge went on to find that, in *Spruce Up*, the Board limited the application of the *Burns* "perfectly clear" caveat to cases "in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[6]

The judge concluded that the Respondent clearly manifested its intention to establish its own initial terms of employment at the same time that Cunningham announced the Respondent's intention to hire a majority of Aero unit employees. Specifically, the judge found that the mention that employees would lose their seniority was a sufficient signal to employees that the terms and conditions of employment would be different under the Respondent's operation. For these reasons, the judge found that the Respondent did not forfeit its unilateral right under *Burns* to establish the initial employment terms for the successor employees by misleading unit employees about its intentions.

Unlike the judge, we do not find an application of *Spruce Up*'s interpretation of the *Burns* caveat to the facts of this case to be determinative of the legality of the Respondent's conduct.[7] Instead, we rely on another well-established exception to the right of a *Burns* successor to set initial terms and conditions of employment. In *U.S. Marine Corp.*, 293 NLRB 669, 672 (1989), for example, the Board held that

> an employer—like the Respondents—that unlawfully discriminates in its hiring in order to evade its obligations as a successor does not have the *Burns* right to set initial terms of employment without first consulting with the Union. The Respondents forfeited any right they may have had as a successor to impose initial terms when they embarked on their deliberate scheme to avoid bargaining with the Union by their discriminatory hiring practices.

This equitable doctrine, which arose in the context of defining an appropriate remedy for an employer that sought to avoid the successor's bargaining obligation by refusing to hire applicants from the predecessor's unionized work force,[8] is equally relevant to the allegation here of unlawful unilateral changes. The fundamental premise for the forfeiture doctrine is that it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). In other words, the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions.

Of course, unlike in *U.S. Marine*, *Love's Barbeque*, and *State Distributing Co.*, there is no allegation in this case that the Respondent unlawfully discriminated in its hiring practices. In fact, it looked exclusively to the predecessor's unionized work force and hired a majority of Aero's unit employees in forming its own initial employee contingent. Furthermore, for purposes of this litigation, the Respondent conceded that it was a *Burns* successor bound to recognize the Union when plant operations resumed on December 1.

At the time of successorship, however, the Respondent did not conduct itself like a lawful *Burns* successor. At this unsettling time of transition, when "a union is in a peculiarly vulnerable position" and employees "might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor,"[9] the Respondent unlawfully declared through Cunningham to all Aero employees that there would be no union for those whom it hired. Fourteen days later, the Respondent relied on the results of an employee poll tainted by Cunningham's statement when it refused to bargain with the Union and thereafter refused to recognize the Union as the unit employees' representative.

A statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 right to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment. Nothing in *Burns* suggests that an employer may impose such an unlawful condition and still retain the unilateral right to determine other legitimate initial terms and conditions of employment. A statement that there will be no union serves the same end as a refusal to hire employees from the predecessor's unionized work force. It "block[s] the process by which the obligations and rights of such a suc-

[5] 406 U.S. 272, 294–295.

[6] 209 NLRB 194, 195 (fn. omitted).

[7] We therefore do not rely on the judge's *Spruce Up* analysis. Moreover, Chairman Gould does not agree with the *Spruce Up* majority's interpretation of the *Burns* caveat. See the Chairman's concurring opinion in *Canteen Co.*, 317 NLRB 1052, 1054–1055 (1995).

[8] See *Love's Barbeque Restaurant*, supra.

[9] *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27, 39–40 (1987).

cessor are incurred." *State Distributing*, 282 NLRB at 1049.

In sum, we hold that by declaring at the outset that there would be no union at its facility, the Respondent, like a successor that discriminatorily refuses to hire a majority of its predecessor's employees in order to avoid recognizing and bargaining with a union, forfeited its *Burns* right to set initial terms and conditions of employment without first bargaining with the Union. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing wages and benefits when it commenced operations.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 5 of the judge's Conclusions of Law.

"5. By modifying the terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain over these matters, the Respondent violated Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

On request, the Respondent shall bargain with the Union concerning wages, health and welfare benefits, vacations, holidays, and other terms and conditions of employment. Furthermore, in order to remedy the Respondent's unlawful unilateral changes, we shall order the Respondent, on request of the Union, to rescind any changes in employees' terms and conditions of employment unilaterally effectuated and to make the employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse. As the Seventh Circuit stated in enforcing the Board's decision in *U.S. Marine*, a remedial measure of this kind not only is "designed to prevent [the Respondent] from taking advantage of its wrongdoing to the detriment of the employees . . . [but a] return to the status quo ante at least allows the bargaining process to get under way." 944 F.2d at 1322–1323. Employees shall be made whole in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also make whole its unit employees by making all delinquent employee benefit fund contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.[10]

ORDER

The National Labor Relations Board orders that the Respondent, Advanced Stretchforming International, Inc., Gardena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling potential applicants for employment that it intends to operate with no union when it is obliged to recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL–CIO.

(b) Polling its employees concerning representation by the Union.

(c) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at the Respondent's facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined in the Act.

(d) Changing the terms and conditions of employment of employees in the above unit without notice to and bargaining with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Union in writing that it recognizes that labor organization as the exclusive representative of its employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for employees in the appropriate unit.

(b) On request, bargain with the Union concerning terms and conditions of employment of unit employees.

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[10] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

(c) On request, cancel changes in terms and conditions of employment of unit employees unilaterally effectuated and make employees whole by remitting all wages and benefits that would have been paid absent the Respondent's unlawful conduct, until the Respondent negotiates in good faith with the Union to agreement or to impasse, in the manner set forth in the amended remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Gardena, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 11, 1992.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HIGGINS, concurring.

I agree with my colleagues that, under the circumstances of this case, the Respondent violated Section 8(a)(5) and (1) by unilaterally setting the initial terms and conditions of employment for the unit employees. I do not, however, adopt all of their analysis.

Under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), a successor employer is ordinarily free to establish initial terms and conditions for unit employees. The majority finds that the Respondent, an admitted *Burns* successor, forfeited this right because it unlawfully declared that there would be no union at its facility. It did so at the time that it announced that it would hire a majority of the predecessor's employees under altered terms and conditions. In their view, this 8(a)(1) statement was antithetical to the Respondent's *Burns*' obligation to bargain in good faith and was analogous to situations where successors unlawfully and discriminatorily refuse to hire a majority of its predecessors' employees. I disagree with this view.

In my view, the mere 8(a)(1) statement would not warrant forfeiture of the Respondent's *Burns*' rights to set initial terms and conditions for its employees. Although unlawful, I do not find that such a statement, in isolation, establishes that an employer has "embarked on [the] deliberate scheme to avoid bargaining with the Union by . . . discriminatory hiring practices,"[1] or that it has "unlawfully blocked the process by which the obligations and rights of . . . a successor are incurred." *State Distributing Co.*, 282 NLRB 1048, 1049 (1987). Nor do I agree with my colleagues that the statement is analogous to a discriminatory refusal to hire. Cf. *Love's Barbeque Restaurant*, 245 NLRB 78 (1979), enfd. in relevant part sub nom. *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

Here, however, the Respondent did not merely utter the unlawful "no union" statement; it acted on it. Within days of this 8(a)(1) statement, and its hire of the predecessor's employees, the Union repeatedly demanded that the Respondent recognize and bargain with it. Rather than accede to these demands, as it was obligated to do, the Respondent promptly conducted an unlawful poll of employee sentiment.[2] Further, within 2 weeks of its unlawful statement, the Respondent expressly refused to recognize the Union, in violation of Section 8(a)(5) and (1). Thus, the Respondent, by both act and word, violated Section 7 rights and dishonored its *Burns* obligations. Having done so, it cannot claim the privilege of setting initial terms and conditions for the unit employees.

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) by unilaterally setting the initial terms and conditions of the unit employees.[3]

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *U.S. Marine Corp.*, 293 NLRB 669, 672 (1989).

[2] *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

[3] In all other respects, I agree with my colleagues.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT tell employees or potential applicants that we intend to operate with no union when we are obliged to recognize and bargain with International

Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL–CIO.

WE WILL NOT poll employees concerning representation by the Union and WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at our facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined in the Act.

WE WILL NOT change terms and conditions of employment of the employees in the above unit without notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union in writing that we recognize it as the exclusive representative of our employees under Section 9(a) of the Act and will bargain with it concerning the terms and conditions of employment for our employees in the appropriate unit.

WE WILL, on request, bargain with the Union concerning terms and conditions of employment of unit employees.

WE WILL, on request, cancel changes in terms and conditions of employment of unit employees unilaterally effectuated and make employees whole by remitting all wages and benefits that would have been paid absent our unlawful conduct, until we negotiate in good faith with the Union to agreement or to impasse.

ADVANCED STRETCHFORMING INTERNATIONAL, INC.

Yvette H. Holliday-Curtis and *Peter Tovar, Esqs.*, for the General Counsel.

Thomas H. Reilly, Esq., with *Richard C. White, Esq. (O'Melveny & Meyers)*, on the brief, of Newport Beach, California, for the Respondent.

Margo A. Feinberg, Esq., with *Henry M. Willis, Esq. (Schwartz, Steinsapir, Dohrmann & Sommers)*, on the brief, of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. The General Counsel alleges here that Advanced Stretchforming International, Inc. (Respondent or Company), as a successor employer, refused to recognize International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Amalgamated Local Union No. 509, AFL–CIO (the Union or the Charging Party), and bargain over the initial terms and conditions of employment, both in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The General Counsel also alleges that Respondent polled its employees concerning union representation in violation of Section 8(a)(1) and (5), and that it told its predecessor's employees that it intended to operate without a union in violation of Section 8(a)(1).

The Union filed the unfair labor practice charge on December 11, 1992.[1] On April 30, 1993, the Regional Director for Region 21 of the National Labor Relations Board (the Board or NLRB) issued a complaint and notice of hearing. Respondent timely answered the complaint denying that it engaged in the unfair labor practices alleged.

I heard this case over the course of 4 days between September 23 and October 14, 1993, at Los Angeles, California. Having now carefully considered the record, the demeanor of the witnesses while testifying, and the parties' posthearing briefs, I conclude that Respondent violated the Act in certain respects based on the following

FINDINGS OF FACT

I. JURISDICTION AND OVERVIEW

Respondent, a corporation engaged in the business of stretchforming structural body components used in the aerospace industry, commenced operations from its facility located at Gardena, California, on December 1. Based on an annual projection of its operations between December 1 and April 30, 1993, when the complaint issued, Respondent's direct outflow will annually exceed the dollar volume standard established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, I find Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Two predecessor employers engaged in stretchforming operations at the Gardena facility for more than 20 years prior to its acquisition by Respondent. During the period that the predecessor Aeronca owned and operated the enterprise, the Union was recognized as the collective-bargaining representative for the plant's production and maintenance employees and a series of successive collective-bargaining agreements ensued until the operation was acquired in early 1990 by Aero Stretch, Inc. (Aero). Thereafter, Aero and the Union negotiated a successor agreement effective from August 19, 1991, through August 19, 1994.

In June, Aero filed a Chapter 11 bankruptcy proceeding and continued to operate the facility through November 30. Throughout this period, Aero gradually laid off employees so that by November 30 when Aero ceased operations, 17 unit employees remained. Aero made no attempt to secure court relief from the collective-bargaining agreement. Instead, it unilaterally ceased payments for employee health benefits in October which resulted in the cancellation of health benefits in mid-November, failed to implement incremental wage increases due to employees under the collective-bargaining agreement, terminated contributions to an employee 401(K)

[1] All dates below refer to the 1992 calendar year unless shown otherwise.

plan provided for under the agreement, and generally disregarded contractual job classifications in making work assignments. The Union took no action to contest these modifications but Union Agent Dwaine LaMothe contacted several Aero officials in the postbankruptcy period to inquire about Aero's financial condition and to explore the reported sale prospects of the enterprise.

During the summer and fall Aero unsuccessfully courted several prospective buyers. Eric Cunningham, Aero's operations director, advised employees monthly about Aero's efforts to locate a buyer and the status of the bankruptcy proceeding. After Aero's principal creditor rejected the most recent buyout proposal at a November 19 bankruptcy hearing, the Bankruptcy Court converted Aero's bankruptcy to a Chapter 7 proceeding, auctioned its assets, and ordered Aero to terminate its employees and close on November 30. Apparently, Aero anticipated this development because it had begun to coordinate the removal of customer tools and dies from the plant prior to the November 19 hearing.

Steven Brown, a southern California entrepreneur, submitted the successful bid for Aero's assets through an agent at the November 19 hearing. Although Brown ostensibly purchased the assets with the intention of liquidating them forthwith, he quickly decided to continue the Gardena stretchforming operation. By December 1, Brown incorporated Respondent, secured the financing required to close the bankruptcy sale, and invited Aero's employees to submit employment applications.

As required by the November 19 Bankruptcy Court order, Aero terminated all of its employees on November 30. The following day Respondent formally employed the entire management, professional, and administrative staff terminated by Aero on the previous day, including John Rockwood, Aero's president who was retained as Respondent's president, and eight unit employees. No unit employees were hired from other sources at this time. During their employment interviews, the employees were informed of new terms and conditions of employment which differed from Aero's terms. This staff commenced work immediately to complete Aero's work in progress and to prepare for new work of like kind.

On December 3, 7, and 11, LaMothe sent letters to Brown demanding recognition. Before responding to the last demand letter on December 14, Respondent polled its employees concerning continued representation by the Union and the employees who participated in the poll voted against continued representation. Thereafter, Brown's counsel wrote LaMothe rejecting the Union's demand on the ground that Brown had a good-faith doubt of the Union's majority standing and on the further ground that the demand was premature because Respondent planned to add "quite a few new production-type employees in the near future."[2]

[2] Respondent does not defend its December 14 refusal to recognize the Union on the ground that it had not yet employed a representative complement of employees. Between December 1 and the date of the hearing Respondent had employed 11 additional unit employees in the following sequence: 2 in January; 3 in March; 3 in April; 2 in June; and 1 in August. One non-Aero employee was hired in March and three more non-Aero employees were hired in June and August. At least one employee, Duane Mooney, hired in April worked only 1 week. I find this evidence would not support a "representative complement" defense if made. *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375 (9th Cir. 1987).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Setting Initial Terms of Employment*

In its brief, Respondent concedes that it is a successor employer under the standards enunciated in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). As Respondent continued to engage in the same business at the same location utilizing all of its predecessor's managerial, supervisory, and administrative personnel, and only unit employees employed by its predecessor, I find Respondent is a successor employer under *Burns*.

In *Burns*, the Supreme Court affirmed the court of appeals refusal to enforce a Board order requiring that employer to adopt its predecessor's collective-bargaining agreement. Having refused to adopt the rationale for the Board's affirmative order, the Court then addressed the Board's general characterization that a successor employer's bargaining obligation was analogous to an employer's obligation to refrain from unilaterally changing wages and other benefits during the period between collective-bargaining agreements.

Justice White, on behalf of the *Burns* Court, wrote that it was "difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit." Although Burns may have employed workers on terms different than those of its predecessor, Justice White noted that "it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired." However, he observed that "[a]lthough a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." Later the Supreme Court made clear that this caveat concerning the duty to bargain over the initial terms refers to the "exceptional situation" whereas a successor's right to unilaterally establish its initial terms is the "standard situation." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 at fn. 15 (1986).

In *Spruce Up*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board announced its intention to limit the application of the *Burns* caveat to cases "in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained *without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer . . . has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.*" (Emphasis added.) The Board reaffirmed this approach in *Fremont Ford*, 289 NLRB 1290 (1988). There it stated that "[s]ince *Spruce Up* the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees unless the successor has misled them." See also *Worcester Mfg.*, 306 NLRB 218 (1992).

Underlying the General Counsel's allegation that Respondent unilaterally changed the wages and benefits contained in the Aero collective-bargaining agreement when it com-

menced operating the business is the contention that the facts here merit the conclusion that this case fits the *Burns* caveat. The relevant facts and my conclusions on this issue follow.

1. The evidence

The unit employees first learned of potential employment opportunities with Respondent at a November 30 meeting conducted by Cunningham. LaMothe happened to be at the plant that day and listened to Cunningham address the assembled employees about their future. LaMothe claims that Cunningham told the employees at that time that a majority of the employees would be hired by the new buyer's company (Respondent) but "there would be no union and no seniority and the new company was not responsible for any of the previous administrative claims." One employee, LaMothe claims, asked why there would be no union. Purportedly, Cunningham stated that Aero had lost several contracts because of the Union wages and benefits and, therefore, the plant could not afford to operate with the Union.

Tyron Bennett, the unit chairperson, recalled that Cunningham told the employees on this occasion that they would all be terminated but a majority would be rehired. He claims that Cunningham stated that "there will be no union, no seniority, no nothing."

Howard Venard, Aero's production supervisor who was hired as Respondent's production manager on December 1, testified that Cunningham told the employees at the November 30 meeting that all would be terminated but they should report for interviews the following morning at their regular worktime. He further testified that Cunningham told employees that the new company "wasn't going to abide by the Union contract and . . . that there wouldn't be any seniority." Venard explained that he interpreted Cunningham's "Union contact" statement to mean that there would be no union at the new company and, consequently, in a prehearing statement he provided to the General Counsel, Venard stated that Cunningham told the employees on this occasion that there would be "no union."

Cunningham's acknowledges that he met with the employees on this occasion and told them that they would all be terminated from Aero effective at the end of that workday. At Brown's instruction, Cunningham further advised the employees that, if they were interested in working for the new company, they should turn in the previously distributed employment applications if they had not already done so and report to the plant at their regular time the following morning to interview for employment. He stated that some of the employees would be hired immediately and others would be employed later after the new company acquired more work. In agreement with the others who testified, Cunningham said that he told the employees, in effect, that they would not be credited with their prior seniority at the facility if they were employed by the new company. However, Cunningham denied that he told the employees that there would be no union. Instead, he claims that he told the employees either on this occasion or at another meeting on November 20 that the buyer would not assume the union contract.[3]

There is no evidence that Brown spoke with any of the plant employees or union representatives nor is there any evidence that Brown caused any written statement concerning Respondent's initial terms and conditions of employment to be published prior to December 1. On December 1, each individual interviewed for employment with Respondent signed the following statement:

> I UNDERSTAND THAT I WILL BE WORKING UNDER NEW TERMS AND CONDITIONS WHICH IS NOT A CONTRACT AND IS SUBJECT TO CHANGE.
>
> NEW COMPANY IS NOT ASSUMING COLLECTIVE BARGAINING AGREEMENT.
>
> YOU MAY BE EMPLOYED BY NEW COMPANY ON AN AT WILL BASIS.
>
> DETAILED LIST OF TERMS AND CONDITIONS IS TO FOLLOW.

Brown interviewed and hired Cunningham as the Respondent's general manager early on December 1. Pursuant to Brown's instructions, Cunningham conducted most of the rest of the interviews and claims, without contradiction, to have informed those interviewed that the benefit terms would be identical to those offered to Cunningham which Brown derived from the employee handbook effective at Camarillo Dynamics, another company Brown owns near Ontario, California.

Among other benefits, Respondent's initial terms provided for less vacation time and fewer paid holidays than had been in effect at Aero. Contrary to Aero, Respondent provided no medical or dental benefits for unit employees. Of the eight unit employees hired by Respondent on December 1, four were employed at the same hourly wage rate they received at Aero, two received wage increases which exceeded a dollar per hour, and two received wage decreases which were more than a dollar per hour.

2. Further findings and conclusions

The General Counsel and the Charging Party argue that Respondent's obligation to bargain with the Union arose before it established its initial terms of employment and, hence, it was obliged to negotiate those terms with the Union. They contend that once Respondent made the decision secure its work force from among the Aero employees the *Burns* caveat applied and Respondent was no longer at liberty to unilaterally establish new terms and conditions of employment. In my judgment, this theory is at odds with *Burns* and *Spruce Up*.

In ordinary circumstances, a successor employer would likely look to the existing work force to staff an enterprise unless exigencies dictated otherwise. Nothing here suggests that Brown was in a position to secure a work force elsewhere. To be sure, he owned a machine shop in the Los Angeles metropolitan area but at such a distance that the two or so Camarillo employees approached by Brown about transferring to the Gardena facility declined a transfer because of the lengthy commute involved. Moreover, Respond-

[3] Allegedly, Brown told Cunningham on November 20 that he would not assume the union contract and Cunningham claims to have so informed the employees. However, this account is inherently inconsistent with Brown's claim that he did not decide to continue the operation rather than liquidate the equipment until about a week later while on a trip to Texas and, seemingly, would have no reason to address the union contract question as early as November 20.

ent's operation obviously required a work force with certain specialized skills which were most readily available from Aero's workers. Here there is no doubt but that Brown was a small entrepreneur venturing into a new enterprise bearing only a modicum of similarity to his other companies. Hence, the likelihood that he would have a readily available work force apart from that which existed at Aero would be unlikely.

These exigencies, in my judgment, confuse the General Counsel and the Charging Party. Unlike a nationwide enterprise such as Burns which employs semiskilled employees, or less, by the thousands and regularly shifts employees from one location to another, Brown ventured into a highly specialized industry engaged in the manufacture of airplane skins and related structural paraphernalia where, it should be anticipated, he would give preference to the predecessor's work force as a practical business judgment. Hence, Brown's decision, whether made in the bankruptcy courtroom or later as he contends, to operate the Gardena plant using employees from the existing work force can hardly be considered an extraordinary circumstance requiring application of the *Burns* caveat.

On the contrary, the *Spruce Up* doctrine essentially requires an examination as to whether, once Brown decided to operate the business with the predecessor's workers, he or his agents led the Aero employees to believe that they would be employed under the existing wages, hours, and conditions of employment or, at the very least, said nothing about any new terms and conditions of employment. The evidence here plainly shows that the General Counsel has not met the *Spruce Up* criteria.

Although I agree, as the General Counsel and the Charging Party contend, that Cunningham was Brown's agent even before any formal hiring process on December 1, nothing in Cunningham's November 30 statements to the Aero employees should have lead them to expect that there would be no changes in their terms and conditions of employment. Instead, the contrary is true. The mere mention that employees would forfeit their seniority is a clear signal that, when employed by the Brown enterprise, things would be different. Moreover, the form employees were required to sign the following morning during the employment interviews further articulated Respondent's intention to establish its own initial terms of employment. Hence, I find that this intention was clearly made known to the employees contemporaneous with Respondent's announcement of employment opportunities. I find, therefore, that Respondent never forfeited its right to unilaterally establish its initial employment terms.

The principal authorities cited by the General Counsel and the Charging Party, *Helnick Corp.*, 301 NLRB 128 (1991), and *A-1 Schmidlin Plumbing*, 284 NLRB 1506 (1987), do not support a different conclusion. In *Helnick* the administrative law judge specifically found that the successor employer "informed employees that they could all expect to be retained . . . [without discussing] in any detail with any employee at that time the numerous changes in fringe benefits which he later made." 301 NLRB at 134. Similarly, in *Schmidlin* the successor employer made no mention of any changes in the terms and conditions of employment when he told the predecessor's employees that the successor would hire them if they wanted to work for the new company. Indeed, the *L.A.X. Medical Clinic* citation in footnote 3 of *Schmidlin* clearly shows that the Board relied on the employer's silence when offering employment to the predecessor's employees as the basis for imposing the status quo remedy. This construction of *Helnick* and *Schmidlin* is consistent with the Board's continued application of the *Spruce Up* doctrine in the later *Level* case.

As found above, Respondent, by Cunningham, signaled employees concerning changes in employment terms at the very time he announced that there would be employment opportunities. In my judgment, it is of no moment that he did not detail the extent of the changes as he did the following morning during the employment interviews. His unequivocal statement concerning the treatment of seniority on November 30 is enough to preclude any finding that Respondent was silent, or misled the Aero employees into believing there would be no changes. That being the case, I read *Spruce Up*, to compel the conclusion, which I have reached, that the changes in the terms and conditions of employment which occurred on December 1 were lawful. Accordingly, the recommended Order will provide for the dismissal of the allegation that Respondent violated Section 8(a)(1) and (5) by that conduct.

However, I credit the claim by Bennett and LaMothe that Cunningham told employees at the November 30 meeting that there would be no union at the new company and find that this remark violated Section 8(a)(1) as alleged. *Level*, supra; see also *Love's Barbeque*, 245 NLRB 78, 124 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981). Their account is essentially corroborated by Venard's prehearing statement, prepared in the presence of Respondent's counsel. Moreover, Venard's attempt to retract this portion of his prehearing statement while testifying impressed me as contrived.

Even so, Respondent contends that it is not responsible for Cunningham's statement because he was an employee of Aero, rather than Respondent, when the statement was made. Wholly apart from the fact that the circumstances of Cunningham's remarks on November 30 merit the conclusion that he was speaking with the apparent authority of Brown, I have concluded that the accounts of Respondent's principal witnesses, Brown, Rockwood, and Cunningham, is so far fetched and untruthful as to merit the inference that Brown had actually selected at least Cunningham to continue in a responsible managerial position prior to November 30. In particular, Cunningham admitted that in the interim period between November 19 and December 1, he prepared a business plan for the continuation of the operation which included, among other matters, the selection of the employees who would be offered employment first. Essentially, Cunningham explained that he did so on the off-hand chance that Brown would decide to operate the business. This assertion was unconvincing when he made it from the witness chair and it became even more unconvincing when I again studied it in the transcript. For that reason, I refuse to credit Respondent's entire account concerning the timing of the selection of its managerial agents and reject its claim that Cunningham was not its agent when he addressed the employees on November 30.

B. *The Poll and Respondent's Refusal to Recognize the Union*

Where, as here, a successor employer makes a conscious decision to maintain generally the same business and to hire

a majority of its employees from its predecessor's work force, the successor is obliged under Section 8(a)(5) of the Act to recognize and bargain with the collective-bargaining agent of the predecessor employees. Underlying this obligation is the presumption that the bargaining agent enjoys majority support among the unit employees. If, however, the successor employer can show that the bargaining agent has in fact lost its majority standing, or that it has a good-faith doubt based on objective factors that the agent has lost its majority support, it may lawfully refuse to recognize and bargain with the incumbent agent. *Fall River Dyeing v. NLRB*, supra.

A successor employer can demonstrate that the employee bargaining agent has actually lost its majority standing either by petitioning for a Board-conducted election under Section 9 of the Act or by polling its employees to determine the degree of support the agent enjoys. If the latter course is chosen, the employer must adhere to several safeguards to avoid unlawful interference under Section 8(a)(1) of the Act. When the poll is conducted for the purpose of determining the degree of employee support for an incumbent union, the employer must be able to show that: (1) the union was given advance notice of the time and place of the poll, *Texas Petrochemicals*, 296 NLRB 1057 (1989); (2) it has a good-faith doubt based on objective factors that the union no longer enjoys majority support, *Thomas Industries*, 255 NLRB 646 (1981); (3) employees were told truthfully that the purpose of the poll was for the purpose of determining the degree of support enjoyed by the union; (4) employees were given assurances against reprisals; (5) the poll was conducted by secret ballot; and (6) the poll was conducted in an atmosphere free of unfair labor practices or other forms of coercion, *Struksnes Construction Co.*, 165 NLRB 1062 (1967).

A successor employer who withholds recognition on the basis of a poll or on the basis of an asserted good-faith doubt is essentially acting at its own peril. Hence, if the poll is defective or if the employer is unable to sustain its good-faith doubt, an employer may be found guilty of an unfair labor practice.

Respondent admittedly refused to recognize the Union but its answer affirmatively avers that it "conducted a noncoercive poll, by secret ballot and with assurances of nonreprisal . . . to determine whether the [unit] employees wanted to be represented by the Union in light of previous statements made by employees against union representation." Respondent further avers, and the evidence establishes, that the poll "resulted in seven votes against union representation and only one vote in favor of union representation."

The General Counsel argues that although Respondent complied with some of the required safeguards for conducting a valid poll on December 14, the poll nonetheless was defective because it was conducted in the context of an unremedied unfair labor practice, i.e., the November 30 Cunningham "no union" statement, and a coercive atmosphere as evidenced by the "I doubt that claim" statement made on the ballot form itself.[4] In addition, the General Counsel further notes that Respondent failed to notify the Union in advance of the poll as required by *Texas Petrochemicals*. The Union joins most of the General Counsel's arguments but further asserts that Respondent's good-faith doubt evidence is simply "hearsay or supposition" insufficient to support Respondent's refusal to recognize the Union.

For all practical purposes Respondent's brief abandons the poll as a justification for refusing to recognize the Union. Thus, Respondent concedes that it did not notify the Union in advance of the poll but argues that this was merely a technical violation requiring, at most, a cease-and-desist order. Instead, Respondent now argues that the poll is irrelevant because it "had a sufficient doubt as to the union's majority status even without the poll, and the poll merely provided cumulative evidence of the union's lack of support." The relevant facts and my conclusions on this issue follow.

1. The evidence

To support its good-faith doubt defense Respondent relies on the testimony of Cunningham and Venard about employees expressing disenchantment with the Union. Cunningham testified that sometime in October 1992, shipping and receiving clerk Joe Hernandez stated that he was dissatisfied with the Union and asked how he could get rid of the Union. Cunningham told Hernandez that he did not know and did not pursue an answer to Hernandez' question.

Cunningham further testified that a group of employees approached him in early November 1992. The group included Arturo and Reynaldo Ayala, Mike Vigil, Denny Bass, and Carlos Cordova who seemed to be speaking for the group. At that time Cordova asked Cunningham how they could "go about decertifying the Union." None of the other employees spoke at all either to express dissatisfaction with the Union or to disavow Cordova's statements to Cunningham. Cunningham promised to find out and, to this end, reported the inquiry (but not the names of those present) to Rockwood. Purportedly, Rockwood provided a long explanation of the decertification process which became so complicated for Cunningham that he abandoned any notion of responding to the employees. Insofar as is known, Cunningham never took the matter up with Cordova or the others again.

Toward the end of November, Cunningham overheard employee Larry Stevens shouting at Union Agent LaMothe during a meeting at the shop but he could not understand the substance of the LaMothe-Stevens exchange. Later, Stevens approached Cunningham and stated in an upset manner: "How can I get rid of this Union? They're doing nothing for me. We don't want them here." No evidence establishes that anyone else was present when Stevens made these latter comments. Cunningham provided Stevens with no advice and did not report this incident to his superiors.

Venard testified that he had numerous conversations with employees concerning their dissatisfaction with the Union. He recalled two meetings in particular. On one occasion in the middle of November, a group of employees which included the two Ayalas, Mike Vigil, Carols Cordova, Bryan Van Overbook, and Danny Bass approached Venard right after a break period. According to Venard, Vigil stated, in substance, that "they were tired of the Union and they want-

[4] Although the General Counsel's complaint makes factual allegations concerning the poll in par. 12, the complaint contains no specific allegation that the poll constitutes an unfair labor practice. However, as counsel for the General Counsel stated clearly in her opening statement that the poll was unlawful, and as the matter has been fully litigated, I have treated par. 12 as an allegation that the poll is an independent unfair labor practice.

ed to know . . . how they could go about getting rid of it." Venard plead ignorance and referred them to Cunningham. Venard told Cunningham that he could expect a visit from these employees and reported the substance of his conversation. About a week later, Venard recalled that he told Rockwood about the conversation.

At approximately the same time, Larry Stevens approached Venard. Although Venard testified that Stevens "wanted to get rid of the Union," Venard said that Stevens was more interested at that time in canceling his dues checkoff so he referred Stevens to the personnel office for that purpose.

After receiving LaMothe's December 11 letter, Brown spoke with Rockwood concerning the Union. Purportedly, Rockwood told Brown that several employees previously had expressed dissatisfaction with the Union to Cunningham and Venard. Brown asked Rockwood to confirm this information with Cunningham and Venard. According to Rockwood, Cunningham and Venard began reporting about employee dissatisfaction with the Union in the summer of 1993. However, in his pre-poll discussions with Brown, Rockwood testified that no mention was made of names and numbers of dissatisfied employees but Brown claims that he was given the impression that more than a majority were opposed to union representation.

As a result of their exchanges, Brown and Rockwood decided to poll employees on December 14 concerning their desire for union representation. Mechanically, Rockwood assembled the employees and explained the purpose of the poll. He further explained the procedure for secret balloting and assured employees that their vote one way or the other was of no moment to him and would not affect their position with the Company. Brown was present during this explanation.

Each employee was given a ballot and permitted to mark it in the privacy of the production office. The ballot began with the explanation that the Union claimed to represent a majority of the unit employees and continued with the following words: "I doubt that claim. However, to clear up this matter, the purpose of this secret poll is to determine the truth of the union's claim." After all unit employees voted, that ballots were counted with the result that has been noted above. Respondent's counsel thereafter sent LaMothe the letter declining to recognize the Union.

2. Further findings and conclusions

Based on the foregoing, I conclude that Respondent violated Section 8(a)(1) and (5) of the Act as alleged by its refusal on December 14 to recognize the Union and that Respondent independently violated Section 8(a)(1) and (5) by polling its employees on the same date.

Struksnes Construction, *Thomas Industries*, and *Texas Petrochemicals* compel the conclusion that Respondent's poll was unlawful. First, I find that the poll was conducted in an atmosphere of coercion and unremedied unfair labor practices. As noted above, I have concluded that Cunningham violated Section 8(a)(1) by informing employees that there would be no union in the new operation. Since that remark occurred in the course of informing employees for the first time about the certainty of a continued operation and immediately in advance of the initial selection of employees for the new entity, the likelihood that the "no union" statement would signal employees that their continued employment was dependent upon the abandonment of their union adherence would be extremely high.

Secondly, I find that regardless of Cunningham's November 30 statement, the evidence of employee disaffection described by Cunningham and Venard is badly tainted by the unalleged unfair labor practices of Respondent's predecessor which were occurring at the time the disaffection was apparently spreading. Thus, Rockwood's admission that he unilaterally abrogated significant economic terms of the collective-bargaining agreement while serving as Aero's president without securing authorization from the bankruptcy court to do so establishes that Respondent's predecessor created an atmosphere, albeit out of necessity perhaps, which, in my judgment, precludes any reliance on the disaffection evidence provided by Cunningham and Venard. Clearly, Aero's economic distress left the Union with practically no reasonable responses to these unilateral changes. Even so, the testimony of Cunningham and Venard fails to demonstrate that a majority of Aero's employees wanted to get rid of the Union. The evidence of union disaffection does not become sufficient for the purposes used here until Respondent—and Cunningham in particular—culled through Aero's work force in the selection of its initial complement of employees and the overall atmosphere of Aero's final months is ignored. Accordingly, I conclude that it would be unreasonable to permit Respondent to look back on this disaffection evidence free of the context in which it arose as a basis for asserting its alleged good-faith doubt either for the purpose of conducting the poll as required by *Thomas Industries* or for the purpose of withdrawing recognition.

Finally, as it concedes in its brief, the poll is tainted by Respondent's failure to give the Union advance notice of the time and place of the poll as required by *Texas Petrochemicals*. In view of these conclusions, I find it unnecessary to address the General Counsel's contention concerning the ballot language.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act which is the exclusive representative of the following appropriate unit of employees under Section 9(a) of the Act:

> All production and maintenance employees including quality control inspectors, maintenance mechanics, metal fabricators, extrusion formers, stretch press operators, warehousemen, assemblers, machinist trainees and machine operators employed at Respondent's facility located at 18620 South Broadway, Gardena, California; excluding office clerical employees, confidential employees, supervisors and guards as defined under the Act.

3. By informing employees on November 30 that there would be no union when it commenced its operation, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By polling its employees concerning representation by the Union on December 14 and by thereafter refusing to rec-

ognize and bargain with the Union as requested, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act as alleged in connection with setting its initial terms and conditions of employment.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, my recommended Order will require it to cease and desist from the unlawful actions found here and to take certain affirmative action designed to effectuate the policies of the Act. Affirmatively, the recommended Order requires Respondent to forthwith recognize and bargain with the Union as the representative of its employees in the existing appropriate unit and post an appropriate notice to employees.

[Recommended Order omitted from publication.]